

United States et al. v. General Electric Company (D.Mass.)

APPENDIX H
TO CONSENT DECREE

DRAFT ADMINISTRATIVE CONSENT ORDER

**Commonwealth of Massachusetts
Executive Office of Environmental Affairs
Department of Environmental Protection**

In the Matter of: _____)

GENERAL ELECTRIC COMPANY •)
PITTSFIELD FACILITY AND RELATED)
OFF-SITE PROPERTIES)

SA 1-0563

**Administrative Consent
Order**

Article I - The Parties

- 1.1. The Department of Environmental Protection (the "Department") is located at One Winter Street, Boston, Massachusetts, with a regional office at 436 Dwight Street, Springfield, Massachusetts.
- 1.2. The General Electric Company ("GE") is a New York corporation with a place of business at 100 Woodlawn Avenue, Pittsfield, Massachusetts.

Article II -Statement of Purpose

- 2.1. This Administrative Consent Order (the "Order") is voluntarily entered into by GE and the Department because they have mutually agreed that it is in the public interest to proceed promptly with the measures called for herein. GE and the Department have agreed that it would be more productive not to expend considerable resources and time in litigating the determinations set forth herein, but instead to use their collective resources and time to undertake forthwith and without delay the measures provided for herein.
- 2.2. This Order shall replace two Administrative Consent Orders previously entered into by GE and the Department -- namely, an Administrative Consent Order governing the Housatonic River and related sites (SA 1-0147 and 1-0151), which was executed and became effective on May 22, 1990; and an Administrative Consent Order governing GE's Pittsfield Facility and related sites (SA 1-0145, 1-0146, 1-0148, 1-0563, and 1-0714), which was executed and became effective on July 2, 1990. The terms of those prior consent orders have been largely (but not entirely) superseded by a Consent Decree executed and lodged by GE, the Department, and other federal and state governmental agencies as of _____, __, 1999 (the "1999 Consent Decree") and entered by the United States District Court for the District of Massachusetts on _____, __, in the case of United States et al. v. General Electric Company (Civil Action No.)._____

- 2.3. The 1999 Consent Decree does not govern the implementation of response actions at Off-Site Properties, as hereinafter defined. Accordingly: the objectives of the Department and GE in entering into this Order are to ensure the prompt, timely, and effective implementation of response actions at Off-Site Properties in accordance with the provisions of this Order.
- 2.4. In light of the entry of the 1999 Consent Decree and the Department's and GE's agreement to this Order, the terms of the May 22, 1990 and July 2, 1990 Administrative Consent Orders referenced above shall be deemed superseded as of the effective date of this Order.

Article III - Definitions

Unless otherwise expressly provided herein, terms used in this Order which are defined in the Massachusetts Contingency Plan ("MCP"), 310 CMR 40.0006, shall have the meanings assigned to them in the MCP. In addition, as used in this Order, the following terms shall have the following meanings:

- 3.1. "1999 Consent Decree" shall mean the Consent Decree executed by GE, the Department, the United States Environmental Protection Agency ("EPA"), and other federal and state governmental agencies concerning the Pittsfield/Housatonic River Site, as lodged in the United States District Court for the District of Massachusetts on _____, 1999, in the case of United States et al. v. General Electric Company (Civil Action No. _____) and entered by the court in that case on _____.
- 3.2. "Dumping Ground" shall mean an area routinely used by multiple parties for dumping trash, debris, or other waste materials.
- 3.3. "East Street Area I-South" shall mean the area within the City of Pittsfield, Massachusetts, that is bounded by East Street on the north, Newell Street on the west, the Housatonic River on the south, and Fasce Place on the east, but shall not include the paved portions of paved roadways themselves (or underlying soil) or the Housatonic River or its banks.
- 3.4. "Fill" shall have the following meanings for purposes of this Order:
 - (a) For any residential or school property, "Fill" shall mean any soil or other waste material present on the property which has come from the GE Facility.
 - (b) For any park or playground which is not a former junkyard, scrapyard, dumping ground, or industrial property (or which is a former junkyard, scrapyard, dumping ground, or industrial property that was owned or operated by GE), "Fill" shall mean any soil or other waste material present on the property which has come from the GE Facility.

- (c) For any park or playground which is a former junkyard, scrapyard, dumping ground, or industrial property (except for one that was owned or operated by GE), “Fill” shall mean any soil (as defined in the MCP) or fullers earth, including such soil or fullers earth containing debris, which has come from the GE Facility.
- (d) For any other type of property not referenced in subparagraph 3.4(a), 3.4(b), or 3.4(c), “Fill” shall have the same meaning as stated in subparagraph 3.4(c).

For purposes of this Order, any Fill associated with GE that is located in Berkshire County shall be presumed to have come from the GE Facility.

- 3.5. “GE” shall mean collectively the General Electric Company and its successors and assigns.
- 3.6. “GE Facility” shall mean the GE facility in Pittsfield, Massachusetts, comprising approximately 250 acres of land, and all areas and places within that facility.
- 3.7. “Industrial Property” shall mean a property where oil and/or hazardous materials are or were routinely used in business operations, except fuel oil for heating. _____
- 3.8. “MCP” shall mean the Massachusetts Contingency Plan, promulgated at 310 CMR 40.0000, as may be amended from time to time.
- 3.9. “Off-Site Properties” shall have the following meanings for purposes of this Order:
 - (a) Except as provided in subparagraph 3.9(b) below, “Off-Site Properties” shall include any property or area located in Berkshire, Franklin, Hampden or Hampshire Counties (the “Western Region”) of Massachusetts, outside the GE Facility, where Fill, as defined in the relevant subparagraph of Paragraph 3.4, from the GE Facility has been deposited, stored, disposed of or placed or has come to be located.
 - (b) “Off-Site Properties” shall not include:
 - (i) Any properties or areas which are subject to the 1999 Consent Decree, except for East Street Area I-South (or other areas, if any) as to which groundwater will be addressed by the 1999 Consent Decree, but soil contamination (if any) is subject to the provisions of this Order;
 - (ii) Any property which is not a residential property, school, park, or playground and is or previously was a municipally owned or operated dumping ground that was municipally owned or operated at the time of dumping;
 - (iii) Any park or playground that was formerly a municipally owned or operated dumping ground and was municipally owned or operated at the time of dumping, but this exclusion will apply only after the performance of any initial investigations or Immediate Response Actions (“IRAs”) for

PCBs otherwise required by this Order, as described in subparagraph 7.1(a) below; or

- (iv) The paved portions of any paved roadways (including roadways covered with chip seal), provided that such roadways were paved prior to the date on which the Department notifies or has notified GE of, or GE otherwise obtains or has obtained, credible evidence of Fill in the roadway or the bordering property along the roadway.

(c) Off-Site Properties shall be considered Tier 1A sites under the MCP

- 3.10 "Park" and "Playground" shall each mean land set aside for use by the public for athletic, recreational or leisure activities.
- 3.11. "PCBs" shall mean polychlorinated biphenyls
- 3.12. "Respond", "Response", "Response Action" shall each mean assess, assessment, contain, containment, remove, or removal.

Article IV ■ Statement of Facts

- 4.1. The Department is a duly constituted agency of the Commonwealth of Massachusetts and is responsible for the implementation and enforcement of the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, M.G.L. Chapter 21E, and the MCP regulations promulgated thereunder at 310 CMR 40.0000.
- 4.2. GE purchased much of the property comprising the GE Facility in 1903 and has used that property for various manufacturing and other purposes from that time to the present.
- 4.3. GE has generated and used oil and/or hazardous material ("OHM") (as defined in the MCP) at the GE Facility, some of which has been released to the environment in and around the GE Facility. Beginning in approximately 1932 and continuing until approximately 1977, GE used PCBs at the GE Facility in the manufacture of certain electrical components. GE disposed of some of these at the GE Facility, and additional PCBs have come to be located at various locations in and around the GE Facility.
- 4.4. In 1990, the Department issued, and GE consented to, two Administrative Consent Orders -- one covering the Housatonic River and related sites, executed May 22, 1990, and the other covering the Pittsfield Facility and related sites, executed July 2, 1990 (the "1990 Consent Orders"). These Consent Orders replaced a prior consent order executed by GE and the Department dated May 27, 1981.
- 4.5. The sites subject to the 1990 Consent Orders are considered Tier IA disposal sites under the MCP by virtue of 310 CMR 40.0670.
- 4.6. Pursuant to the 1990 Consent Orders, GE has carried out numerous response actions at the GE Facility, the Housatonic River, and various related sites under the direct

supervision and oversight of the Department. Since January 1994, the Department has coordinated its oversight of GE's response actions under the 1990 Consent Orders with oversight by EPA of GE's response actions at most of these sites pursuant to a corrective action permit issued by EPA to GE under the federal Resource Conservation and Recovery Act, effective January 3, 1994.

- 4.7. Beginning in 1997, GE has conducted and is continuing to conduct response actions at numerous Off-Site Properties on an expedited and streamlined basis under the direction and oversight and with the approval of the Department. These response actions have been undertaken pursuant to the July 2, 1990 Administrative Consent Order referenced in Paragraph 2.2.
- 4.8. In the Fall of 1997, GE, the Department, EPA, and other interested governmental agencies commenced settlement negotiations to resolve the issues relating to the sites covered by the 1990 Consent Orders with the exception of the Off-Site Properties. These negotiations culminated in the parties' execution of the 1999 Consent Decree, which defines, or establishes a process for determining, the appropriate response actions for most of the sites covered by the 1990 Consent Orders except for the Off-Site Properties. The 1999 Consent Decree provides that, for the sites regulated by such Consent Decree, it will replace the terms of the 1990 Consent Orders executed by GE and the Department. The 1999 Consent Decree does not regulate the Off-Site Properties (or portions of such properties) that will be regulated by this Order.
- 4.9. Although GE has performed, and - upon DEP approval of a Response Action Outcome ("RAO") Statement-will have completed, response actions at numerous Off-Site Properties, other Off-Site Properties have been identified where response actions have not yet been performed or completed, and additional Off-Site Properties may be identified in the future. Accordingly, the Department and GE have agreed that it is appropriate to enter into a revised Administrative Consent Order to govern the implementation of response actions at presently known Off-Site Properties and those Off-Site Properties which may be identified in the future.

Based on the foregoing statement of facts and pursuant to its authority under Section 9 of M.G.L. Chapter 21E, the Department orders, and GE agrees to, the following terms and conditions:

Article V- Parties Bound

- 5.1. This Order shall apply to and be binding upon GE and its successors and assigns. No change in ownership or the corporate or legal status of GE will in any way alter GE's responsibilities under this Order. GE shall not violate this Order.

Article VI • Imminent Hazard Reporting and Immediate Response Actions

- 6.1. GE and its contractors, representatives, and agents shall, throughout the duration of the conduct of response actions at any of the Off-Site Properties, evaluate whether any condition identified or discovered at any Off-Site Property poses or could pose an imminent hazard (within the meaning of the MCP). If GE or its contractors, representatives, or agents identifies a condition that poses or could pose an imminent hazard (within the meaning of the MCP) at any Off-Site Property, GE shall notify the Department as required by the MCP.
- 6.2. In the event that GE or the Department identifies a condition that poses or could pose an imminent hazard (within the meaning of the MCP) at an Off-Site Property and the Department determines that an Immediate Response Action ("IRA") is required, GE shall submit an IRA Plan and perform or arrange for the performance of an IRA to the extent approved or required by the Department consistent with the MCP. Prior to the implementation of an IRA at or in connection with the Off-Site Properties, GE shall obtain the Department's approval except as otherwise provided in the MCP (310 CMR 40.0421). For Off-Site Properties subject to the streamlined process described in Article VII herein, the Department, in its sole determination, may waive the requirements for IRA status reports, IRA completion reports, and other IRA documents described in the MCP.

Article VII • Streamlined Process for Response Actions at Off-Site Properties

- 7.1 The streamlined process set forth in this Article VII shall apply to Off-Site Properties which are used for residential purposes or as a school, park, or playground, and any other Off-Site Properties which the Department determines and GE agrees should be subject to this streamlined process; provided, however, that:
- (a) For any Off-Site Property that is currently used as a park or playground and was formerly a municipally owned or operated dumping ground that was municipally owned or operated at the time of dumping, GE's obligations under this Order shall be limited to proposing, conducting, and reporting on an initial investigation of such property in accordance with Paragraphs 7.3, 7.4, and 7.5, but limited to PCB Aroclors 1254 and 1260, evaluating whether any PCB concentrations detected in soil at the property pose or could pose an imminent hazard (within the meaning of the MCP), and if so and if required by the Department, submitting an IRA Plan and performing an IRA to address such PCB concentrations at the property in accordance with Paragraph 6.2 and the MCP. If the Department determines that any further response actions are necessary at such property, such response actions shall not be subject to or governed by this Order, but shall be subject to and governed by applicable law including M.G.L. c.21E and the MCP.

For the properties subject to this streamlined process, the Department has determined, and GE agrees, that use of this streamlined process is in the public interest, within the discretion of the Department, and consistent with the MCP.

- 7.2 For each **property** subject to the streamlined process, GE shall complete all activities as described in Paragraph 7.3 through 7.16 inclusive, as applicable, on an accelerated schedule to be approved or set by the Department for each submittal and/or action.
- 7.3. Upon GE obtaining credible evidence that Fill from the GE Facility may be located at an Off-Site Property subject to this Article VII, GE shall notify the Department as expeditiously as practicable of such credible evidence of Fill. GE shall then, as directed by the Department, submit to the Department for review and approval an Initial Investigation Plan for such property proposing an initial set of sampling activities to evaluate the presence of OHM at the property, along with a schedule for conducting such activities.
- 1.4. If GE's Initial Investigation Plan is approved by the Department or is approved subject to conditions, GE shall carry out the initial investigations in accordance with the Department's approval or conditional approval on an accelerated schedule as approved or modified by the Department. If GE's Initial Investigation Plan is disapproved by the Department, GE shall revise and resubmit such plan as required by the Department, in order to obtain approval or conditional approval of the Initial Investigation Plan, and GE shall then carry out the initial investigations in accordance with such approval or conditional approval.
- 7.5. Upon completion of the initial investigations, GE shall submit to the Department an Initial Investigation Summary Report (in accordance with a schedule approved or set by the Department). This report shall summarize the investigations conducted and the results of such investigations, and shall include a recommendation regarding the need for further expedited response actions at the property in question.
- 7.6. If the Initial Investigation Summary Report calls for additional assessment activities at the property or if the Department, upon review of that report, determines and notifies GE that additional assessment activities are necessary to evaluate the nature or extent of OHM from the GE Facility, GE shall, on the schedule set forth in the Initial Investigation Summary Report or in the Department's notification letter, submit to the Department for review and approval a Supplemental Investigation Plan proposing the additional investigations necessary to characterize the nature and extent of such OHM at the property, along with an accelerated schedule for conducting such activities.
- 7.7. If GE's Supplemental Investigation Plan is approved by the Department or is approved subject to conditions, GE shall expeditiously carry out the additional investigations in accordance with the Department's approval or conditional approval on an accelerated schedule approved or modified by the Department. If GE's Supplemental Investigation Plan is disapproved by the Department, GE shall revise and resubmit such plan as required by the Department to address OHM from the GE Facility, in order to obtain approval or conditional approval of the Supplemental Investigation Plan; and GE shall then expeditiously carry out the additional investigations in accordance with such approval or conditional approval.

- 7.8. Upon completion of the supplemental investigations, GE shall submit to the Department a Supplemental Investigation Summary Report (in accordance with a schedule approved or set by the Department). This report shall summarize the supplemental investigations conducted and the results of all investigations at the property, and shall include a recommendation regarding the need for additional investigations and/or remedial action at the property in question to address OHM from the GE Facility.
- 7.9. If GE's Supplemental Investigation Summary Report calls for additional investigations at the property or if the Department, upon review of that report, determines and notifies GE that additional investigations are necessary to evaluate the nature or extent of OHM from the GE Facility, GE shall undertake the additional investigations determined to be necessary by GE or the Department. Upon completion of such additional investigations, GE shall submit to the Department a further Supplemental Investigation Summary Report (in accordance with a schedule approved or set by the Department), summarizing the additional investigations and the results thereof and including a recommendation regarding the need for remedial action at the property to address OHM from the GE Facility.
- 7.10. If, upon conclusion of the supplemental investigations, GE concludes, or the Department determines and notifies GE, that remedial action at the property is required under the MCP to address OHM from the GE Facility, GE shall submit to the Department for review and approval a Remedial Action Work Plan (in accordance with a schedule approved or set by the Department). That Remedial Action Work Plan shall include: (a) an evaluation of remedial action alternatives, as appropriate; (b) a proposal for expedited remedial action at the property (including proposed locations and depths of soil removal, if any); (c) a justification for that proposed remedial action demonstrating that it is consistent with the requirements of the MCP; (d) a description of pre-implementation activities, site preparation, soil excavation procedures, soil handling and disposal procedures, site restoration activities, health and safety measures to be implemented, and project reporting and documentation; and (e) a proposed accelerated schedule for the remedial action.
- 7.11. If GE's Remedial Action Work Plan is approved by the Department or is approved subject to conditions, GE shall carry out the expedited remedial action in accordance with the Department's approval or conditional approval and with the MCP, on a schedule approved or set by the Department. If GE's Remedial Action Work Plan is disapproved by the Department, GE shall revise and resubmit such plan as required by the Department and the MCP to address OHM from the GE Facility, in order to obtain approval or conditional approval of the Remedial Action Work Plan; and GE shall then expeditiously carry out the remedial action in accordance with such approval or conditional approval and the MCP, on a schedule approved or set by the Department.
- 7.12. Upon completion of the expedited remedial action at the property, GE shall submit to the Department a Final Completion Report, as provided in the approved or conditionally approved Remedial Action Work Plan.

- 7.13. Upon completion of all response actions at the property, GE shall submit to the Department an RAO Statement for the property in accordance with the MCP.
- 7.14. The Department will review the RAO Statement submitted by GE and approve or disapprove such Statement in accordance with the MCP. In the event that the Department disapproves such Statement, GE shall resubmit the RAO Statement as required by the Department and in accordance with the MCP, in order to obtain Department approval of such Statement. Nothing in this Order shall be deemed to preclude GE from seeking dispute resolution under this Order if GE asserts that Department approval of an RAO Statement is being unreasonably withheld.
- 7.15. The Department may determine that any one or more deliverables and/or approvals in the foregoing sequence may be eliminated (except for the Initial Investigation Plan and the RAO Statement), or that additional submittals and/or approvals are necessary, for particular Off-Site Properties. GE shall comply with any such Department determination that is not inconsistent with the MCP.
- 7.16. If, following the Department's approval of an RAO Statement for an Off-Site Property, the Department becomes aware of new information, not known to the Department at the time of such approval, regarding the presence or extent of OHM from the GE Facility at the property which was not previously known to the Department and was not sufficiently addressed by the response actions that led to the Department's approval of the RAO Statement, and if the Department concludes that such new information indicates that conditions at the property (or a portion of the property) no longer achieve a level of no significant risk to human health, welfare, safety or the environment under the MCP, then GE shall, if so directed by the Department, propose and conduct such further response actions at the property (or portion of the property) as are determined by the Department to be necessary to address such conditions in accordance with the MCP. For purposes of this Paragraph, OHM present at concentrations that are generally consistent with concentrations that are known to remain or would be expected following the completion of the response actions in portions of the property (up to the whole thereof) addressed by the RAO Statement as approved shall not be considered new information.

Article VIII • Response Actions at Off-Site Properties Not Subject to Streamlined Process

- 8.1. Off-Site Properties which are not subject to the streamlined process described in Article VII herein shall be subject to this Article VIII (except as otherwise provided in subparagraph 7.1(a) above).
- 8.2. Upon GE obtaining credible evidence that Fill from the GE Facility may be located at an Off-Site Property which is not subject to the streamlined process described in Article VII herein, GE shall notify the Department as expeditiously as practicable of such credible evidence of Fill. GE shall then, as directed by the Department, submit to the

Department for review and approval a Scope of Work for a Phase I Initial Site Investigation as defined by the MCP, to evaluate the presence of OHM at the property, along with a schedule for conducting such investigation.

- 8.3. If GE's Phase I Scope of Work is approved by the Department or is approved subject to conditions, GE shall carry out the Initial Site Investigation in accordance with the Department's approval or conditional approval and as required under the MCP, on the schedule approved or modified by the Department. If GE's Phase I Scope of Work is disapproved by the Department, GE shall revise and resubmit such scope of work as required by the Department and the MCP, in order to obtain approval or conditional approval of the Phase I Scope of Work; and GE shall then carry out the Initial Site Investigation in accordance with such approval or conditional approval.
- 8.4. Upon completion of the Initial Site Investigation, GE shall submit to the Department for review and approval a Phase I Initial Site Investigation Report (in accordance with the schedule approved or set by the Department). This report shall summarize the investigations conducted and the results of such investigations, and shall include a recommendation regarding the need for Comprehensive Response Actions at the property to address OHM from the GE Facility.
- 8.5. If GE's Phase I Initial Site Investigation Report is not approved by the Department or if the Department's approval is conditioned upon the completion of additional work, GE shall undertake the additional work required by the Department and the MCP to address OHM from the GE Facility, in order to obtain approval or conditional approval of the Phase I Initial Site Investigation Report.
- 8.6. If, based on the Phase I Initial Site Investigation Report, the Department determines that Comprehensive Response Actions should be performed at the property to address 'OHM from the GE Facility, GE shall carry out such Comprehensive Response Actions, in accordance with a schedule approved by the Department, including, as necessary, Phases II, III, IV, and/or V, in accordance with and as necessary to meet the requirements of Subpart H of the MCP ("Comprehensive Response Actions"), 310 CMR 40.0800. All submittals by GE during the course of the Comprehensive Response Actions shall be subject to review and approval by the Department in accordance with the MCP provisions for Tier IA sites.
- 8.7. At the conclusion of all response actions at the property, GE shall submit to the Department an RAO Statement for the property in accordance with the MCP.
- 8.8. The Department will review the RAO Statement submitted by GE and approve or disapprove such Statement in accordance with the MCP. In the event that the Department disapproves such Statement, GE shall resubmit the RAO Statement as required by the Department and in accordance with the MCP, in order to obtain Department approval of such Statement. Nothing in this Order shall be deemed to preclude GE from seeking dispute resolution under this Order if GE asserts that Department approval of an RAO Statement is being unreasonably withheld.

- 8.9. If, following the Department's approval of an RAO Statement for an Off-Site Property, the Department becomes aware of new information, not known to the Department at the time of such approval, regarding the presence or extent of OHM from the GE Facility at the property which was not previously known to the Department and was not sufficiently addressed by the response actions that led to the Department's approval of the RAO Statement, and if the Department concludes that such new information indicates that conditions at the property (or a portion of the property) no longer achieve a level of no significant risk to human health, welfare, safety or the environment under the MCP, then GE shall, if so directed by the Department, propose and conduct such further response actions at the property (or portion of the property) as are determined by the Department to be necessary to address such conditions in accordance with the MCP. For purposes of this Paragraph, OHM present at concentrations that are generally consistent with concentrations that are known to remain or would be expected following the completion of the response actions in portions of the property (up to the whole thereof) addressed by the RAO Statement as approved shall not be considered new information.

Article IX - Response Actions at East Street Area 1-South

- 9.1. This Article shall apply to property within "East Street Area 1-South," as defined in Paragraph 3.3.
- 9.2. If not submitted prior to the effective date of this Order, then within 15 days after the effective date of this Order, GE shall submit an Initial Investigation Plan, proposing an initial set of sampling activities to evaluate the presence of OHM, along with a schedule for conducting such activities, at the following properties within East Street Area 1-South, based on evaluation of the available evidence relating to those properties: Parcel J10-6-21 and/or 310-6-10, Parcel J10-6-14 and/or K10-17-1, and Parcel K10-17-3. Following such submittal, these properties shall be addressed by GE in accordance with the streamlined process described in Article VII.
- 9.3. Upon GE obtaining credible evidence that Fill from the GE Facility may be located at any other Off-Site Property within East Street Area 1-South, GE shall notify the Department as expeditiously as practicable of such credible evidence of Fill. GE shall thereafter address such property in accordance with the process described in Article VII or in Article VIII, depending on whether or not the property fits into the categories described in Paragraph 7.1.
- 9.4. If not submitted prior to the effective date of this Order, then within 60 days after the effective date of this Order, GE shall submit to the Department a Supplemental Phase II Scope of Work proposing to conduct the following activities and a schedule for conducting such activities:

- (a) An investigation and evaluation of preferential pathways within East Street Area I-South, consistent with the investigation and evaluation of preferential pathways proposed by GE in the *Addendum to MCP Supplemental Phase II Scope of Work and Proposal for RCRA Facility Investigation of East Street Area I/USEPA Area 3* (submitted to the Department in November 1996);
 - (b) An examination of baseline monitoring and other groundwater data to determine if sumps in East Street Area I-South intercept groundwater; and
 - (c) Resampling of any sumps for which PCB concentrations in excess of 2 ppm in sediment or liquid samples were found during prior sampling by GE, provided that such sumps are still in existence.
- 9.5. If GE's Supplemental Phase II Scope of Work is approved by the Department or is approved subject to conditions, GE shall carry out the work described therein in accordance with the Department's approval or conditional approval and consistent with the MCP on a schedule approved or modified by the Department. If GE's Supplemental Phase II Scope of Work is disapproved by the Department, GE shall revise and resubmit that Scope of Work as required by the Department and consistent with the MCP to address preferential pathways and/or basement sumps within East Street Area I-South.
- 9.6. Upon completion of the investigations described in GE's Supplemental Phase II Scope of Work, GE shall submit a Supplemental Phase II Report in accordance with the schedule approved or modified by the Department. That report shall summarize the investigations conducted and the results of such investigations. It shall also include an evaluation as to whether further response actions are necessary to address preferential pathways and/or basement sumps within East Street Area I-South and, if so, a proposal to conduct such further response actions and a proposed schedule for their implementation.
- 9.7. If GE concludes that further response actions are necessary to address preferential pathways and/or basement sumps within East Street Area I-South and the Department approves or conditionally approves GE's proposal to conduct such actions, GE shall carry out such further response actions in accordance with the Department's approval or conditional approval and consistent with the MCP on a schedule approved or modified by the Department. If the Department disapproves GE's Supplemental Phase II Report or conditions its approval upon the completion of additional work to address preferential pathways and/or basement sumps within East Street Area I-South, or if the Department otherwise determines in accordance with the MCP that further response actions are necessary to address such issues, the Department will so notify GE in writing, and GE shall conduct such additional response actions in accordance with the Department's determination and the MCP on a schedule set by the Department.
- 9.8. Upon completion of all necessary response actions to address preferential pathways and basement sumps within East Street Area I-South, GE shall submit to the Department

for review and approval a final report on such response actions. That report shall include a recommendation as to an appropriate mechanism by which the Department will determine that all such response actions have been satisfactorily completed consistent with the MCP.

Article X - Access

- 10.1. GE shall permit access to the GE Facility, and all property owned or controlled by GE within the Western Region of DEP, by the Department and its employees, consultants, and other authorized contractors, representatives, and agents, at all reasonable times, to the extent necessary for overseeing the implementation of this Order. When visiting the GE Facility, the Department and its employees, consultants, and other authorized agents shall use reasonable efforts to comply with all reasonable safety rules enforced by GE on a non-discriminatory basis against all GE employees and non-GE employees visiting the GE Facility, including the use of protective clothing appropriate for site conditions. However, if GE requires the use of non-standard personal protective equipment for entry to a particular portion of the GE Facility, and if the Department's representatives do not have such equipment and GE is unable to supply the required non-standard equipment upon request, then GE shall not deny access to such portion of the GE Facility. Furthermore, nothing in this Paragraph 10.1 shall be construed to be a waiver of the Department's rights to access to property owned or controlled by GE in accordance with the provisions of M.G.L. Chapter 21E.
- 10.2. GE shall use its best efforts to obtain site access agreements for itself and the Department and their employees, consultants, and other authorized agents from the owners of any property not owned by GE on which work is required under this Order. In the event that such site access agreements cannot be obtained in a timely fashion, GE shall promptly notify the Department in writing, and such notification shall include a description of the efforts made to obtain access, persons contacted, dates of such contacts, and reasons for its lack of success.

Article XI - Public Participation

- 11.1. GE shall participate in good faith and to the extent required by the Department in all public participation activities undertaken pursuant to the MCP in connection with the activities conducted under this Order.

Article XII - Sample Collection

- 12.1. If and where the Department specifically requests prior notice of any sample collection activity conducted under any approved activity pursuant to this Order, GE shall provide such prior notice within the time frame requested by the Department, unless such notice is not practicable, in which case GE shall give the Department as much advance notice as practicable. At the request of the Department, GE shall allow the Department or its authorized representatives to take duplicates of any samples collected pursuant to the terms of this Order.

Article XIII - Permits, Licenses, and Approvals

- 13.1. GE shall use its best efforts to identify for the Department and timely obtain all federal, state, and local permits, licenses, or approvals and any agreements necessary for any actions required under the terms of this Order.

Article XIV - Indemnification

- 14.1. GE agrees to indemnify, save, and hold harmless the Department and its employees, consultants, authorized contractors, representatives, and agents, from and against any and all claims or causes of action arising from or on account of negligent or other tortious acts or omissions of GE and/or its employees, consultants, contractors, representatives, and agents in performing the activities and undertaking its responsibilities pursuant to this Order.
- 14.2. The Department is not to be construed as a party to, and does not assume any liability for, any contract, agreement, or other binding obligation entered into by or on behalf of GE in performing the activities and undertaking the responsibilities assigned to it pursuant to this Order.

Article XV-Dispute Resolution

- 15.1. GE may invoke dispute resolution under this Article XV with respect to any dispute arising under this Order, including any dispute regarding a decision by the Department that GE has failed to comply with any time deadline or requirement established in or pursuant to this Order. The Department and GE shall initially attempt to resolve any such dispute informally. In the event that any dispute arising under this Order is not resolved informally, and if GE wishes to pursue its disagreement by employing formal dispute resolution, GE shall, within 14 days of the Department's written notice that the dispute was not resolved informally, give written notice to the Department as specified in Article XVIII of this Order and to the Department's Assistant Commissioner for Waste Site Cleanup. Such notice shall specify in reasonable detail the disputed matter and present GE's position regarding that matter. After receiving such notice, the Department may submit a written statement of the disputed matter and its position. Within 15 days thereafter, GE may, with the permission of the Assistant Commissioner, submit a reply. In addition, the Assistant Commissioner may, in his or her sole discretion, receive additional information, in oral or written form or both, from the parties to the dispute. After receiving the pertinent information, the Assistant Commissioner shall provide to the Department and to GE a written statement of his/her decision and the reasons therefor. Such decision shall be effective under the terms of this Order.
- 15.2. An election by GE to employ the formal dispute resolution procedures set forth in Paragraph 15.1 above shall temporarily suspend the obligation or deadline which is the subject of the dispute, commencing on the date the Department receives from GE the notice of its disagreement and ending on the date that either GE receives from the Department's Assistant Commissioner a written statement of his/her decision (as described in Paragraph 15.1 above) or the Department and GE enter into a signed agreement that resolves the dispute. Notwithstanding the foregoing, any election by GE to employ the dispute resolution procedures set forth in Paragraph 15.1 above shall in no event delay the implementation of the requirements set forth in Article VI herein, unless the Department, in its sole discretion, agrees otherwise in writing.

Article XVI - Stipulated Penalties

- 16.1. If GE should fail to comply with any time deadline or requirement established in or pursuant to this Order, GE shall pay to the Department the sums set forth below as stipulated civil administrative penalties:
- (a) For a violation of Article VI herein, an amount not to exceed \$ 5,000.00 for each of the first three (3) days on which such a failure to comply occurs or continues, and an amount not to exceed \$ 10,000.00 for each such day thereafter;

- (b) For a violation of any other time deadline or requirement set forth in this Order, an amount not to exceed \$ 2,500.00 for each of the first seven (7) days on which such a failure to comply occurs or continues, and an amount not to exceed \$5,000.00 for each such day thereafter.

GE shall mail payment of such stipulated penalties, in the amounts determined by the Department, to the Department within thirty (30) days of demand by the Department. Such payment shall be made in the form of a check or money order made payable to the Commonwealth of Massachusetts with the tile number from the first page of this Order printed on the face of the instrument, and shall be mailed to the Department c/o Commonwealth Master Lockbox, P.O. Box 3584, Boston, Massachusetts 02241-3584, with copies to the Department as indicated in Article XVII herein.

- 1-6.2. The Department may, in its sole discretion, choose to establish or not impose stipulated civil administrative penalties within the range set forth in Paragraph 16.1 above. If the Department chooses to impose stipulated penalties, GE may challenge, through the dispute resolution procedures established in Article XV herein, the Department's determination that GE has failed to comply with any time deadline or other requirement established in or pursuant to this Order. Subject to that reservation, GE agrees that the Department's exercise of discretion to set the amount of such penalties within the range set forth in Paragraph 16.1 above shall not be subject to the dispute resolution procedures established in Article XV herein, and GE specifically waives any right it may have to challenge in any administrative or judicial forum the monetary amount of any stipulated penalty imposed by the Department pursuant to Paragraph 16.1 herein.
- 16.3. The stipulated penalties set forth in this Article XVI shall not preclude the Department from pursuing any additional remedies and sanctions which may be available by reason of GE's failure to comply with the requirements of this Order; provided, however, that the Department shall not seek statutory or regulatory civil penalties against GE for any violation or alleged violation of this Order for which stipulated penalties have been demanded from GE pursuant to this Article XVI.

Article XVII - Project Coordinators

- 17.1. GE and the Department shall each designate a Project Coordinator with primary responsibility for overseeing the implementation of this Order.
- 17.2. Commencing with the effective date of this Order, the Project Coordinators will be J. Lyn Cutler for the Department and Richard W. Gates for GE. Any permanent change in the designated Project Coordinator shall be accomplished by sending written notice to the other party.

Article XVIII -Notices

18.1. All notices or documents required to be submitted to the Department by GE under the terms of this Order shall be sent by first class mail, postage prepaid, telefacsimile with an official copy to follow by mail, nationally recognized overnight delivery service, or certified mail, to:

- (a) Tine Department's Project Coordinator
- (b) Alan Weinberg
Deputy Regional Director
Bureau of Waste Site Cleanup
Department of Environmental Protection
436 Dwight Street
Springfield, MA 01103
- (c) Adam Wright, Project Manager
Bureau of Waste Site Cleanup
Department of Environmental Protection
436 Dwight Street
Springfield, MA 01103
- (d) Robert Bell, Esquire
Chief Regional Counsel
Department of Environmental Protection
436 Dwight Street
Springfield, MA 01103

and/or to such other persons or addresses as the Department shall designate to GE in writing, and such documents and/or notices shall be deemed duly delivered upon receipt by the Department.

18.2. All notices or documents to be given to GE by the Department under this Order shall be sent by first class mail, postage prepaid, telefacsimile with an official copy to follow by mail, nationally recognized overnight delivery service, or certified mail, to:

- (a) GE's Project Coordinator
- (b) Michael Carroll
Manager, Pittsfield/Housatonic Remediation Programs
General Electric Company
100 Woodlawn Avenue
Pittsfield, MA 01201
- (c) Andrew J. Thomas, Jr., Esquire
Counsel - Environmental Matters
Corporate Environmental Programs
General Electric Company

3 135 Easton Turnpike
Fairfield, CT 0643 1

and/or to such other persons or addresses as GE shall designate to the Department in writing, and such documents and/or notices shall be deemed duly delivered upon receipt by GE.

Article XIX - Force Majeure

- 19.1. If any event occurs which delays or will delay a performance date or prevents the performance of any other obligation established by or pursuant to this Order, which event was beyond the control and without the fault of GE, and which event could not have been prevented or avoided by the exercise of due care, reasonable foresight, or due diligence on the part of GE, GE shall immediately and in any event within five (5) days of such occurrence notify the Department in writing of the anticipated length of the delay or period of non-performance, the cause of the delay or non-performance, and the steps or measures to be taken to prevent or minimize the delay or period of non-performance, including a timetable in which GE intends to implement such steps or measures. Upon receiving the approval of the Department, GE shall implement such steps or measures as are approved by the Department to avoid or minimize any delay or non-performance.
- 19.2. If GE notifies the Department of the occurrence of an event which delays or will delay a performance date or prevents the performance of any other obligation established by or pursuant to this Order, and if GE otherwise complies with the requirements of Paragraph 19.1 above, and if the delay or non-performance has been or will be caused by circumstances beyond the control and without the fault of GE and cannot or could not have been overcome by the exercise of due diligence, the Department shall extend the time for performance hereunder for a period of time equal to the length of the delay or period of non-performance. Financial inability or increased costs associated with the implementation of any action called for by this Order shall not be considered circumstances beyond the control and without the fault of GE.

Article XX - Response Action Costs

- 20.1. GE shall reimburse the Department for all response action costs (including but not limited to all oversight costs) incurred by the Department and its employees, consultants, and authorized contractors (including but not limited to such costs incurred after June 26, 1999 and prior to the effective date of this Order) relating to the conduct and oversight of response actions at the Off-Site Properties subject to this Order and the implementation, administration, and enforcement of the terms of this Order, to the extent recovery of such costs is authorized pursuant to Section 5 of M.G.L. Chapter 21E and 310 CMR 40.1200. The Department shall periodically submit to GE an accounting of the response action costs incurred by the Department hereunder, and GE shall pay such amounts to the Department within 60 days of the billing (or longer if specified in a bill), consistent with 310 CMR 40.1200, provided that GE may seek a Department review of such costs pursuant to any administrative review procedure which the Department may have established pursuant to 310 CMR 40.1220 or, if no such procedures exist, pursuant to the dispute resolution procedures set forth in Article XV herein. If the Department sends GE a bill that demands payment for costs (other than past due amounts from a previous bill) that the Department incurred over a period of time greater than twelve months, and GE, before the time in which payment must be made expires, requests an extension of time to pay, the Department will not unreasonably refuse consent to a reasonable extension of time.
- 20.2. GE shall reimburse the Department the amount of \$274,754.14 as payment for costs incurred by the Department and its employees, consultants, and authorized contractors relating to the conduct and oversight of response actions at Off-Site Properties through June 26, 1999. Payment shall be made within 30 days of the effective date of this Order, in the following manner: GE shall remit payment in the form of a check or money order made payable to the Commonwealth of Massachusetts with the site number SA 1-0563 printed on the face of the instrument, and shall forward such payment to Robert Kalaghan, Director, Fiscal Management/Cost Recovery and Administration, DEP/BWSC, One Winter Street, Boston, Massachusetts 02108.

Article XXI - Department Determination

- 21.1. For Off-Site Properties where response actions have been approved by the Department prior to the effective date of this Order, the Department has determined that the response actions taken or to be taken at such an Off-Site Property pursuant to this Order or the July 2, 1990 Administrative Consent Order ensure that there is no significant risk to human health or the environment at such property (or portion of such property) due to the OHM addressed by such response actions and by an approved RAO Statement, and that no further response actions will be necessary to achieve a condition of no significant risk for such OHM at such property (or portion of such property) that is subject to the RAO Statement, provided that:

- (a) such response actions are implemented and completed in accordance with this Order or the July 2, 1990 Administrative Consent Order (as applicable) and all applicable approval letters and determinations issued by the Department, and a Class A or Class B RAO Statement is approved by the Department; and
 - (b) if the approved RAO Statement relies upon an Activity and Use Limitation (“AUL”), such AUL is complied with.
- 21.2. For Off-Site Properties subject to this Order where the Department has not yet approved response actions, this Order establishes a process intended to ensure that the response actions to be approved for such Off-Site Properties will be protective of human health and the environment.
- 21.3. In the event that, following approval of an RAO Statement for an Off-Site Property, the Department becomes aware of new information that was not previously known or expected and determines, based on such new information, that additional response actions are necessary under the MCP to protect human health or the environment, this Order provides a procedure by which the Department can require such response actions:

Article XXII - Covenants Not To Sue and Reservations of Rights

- 22.1. Except as provided in Paragraph 22.6 herein and subject to Paragraphs 22.3, 22.4, and 22.5 below, the Commonwealth of Massachusetts covenants not to sue or take administrative action (other than the administrative actions under this Order) against GE, whether on its own behalf or as parens patriae, pursuant to the statutes and common law theories listed in subparagraph 22.1(a), to compel GE to implement, comply with, or fund response actions or corrective actions or measures, or for similar judicial or administrative response-type injunctive relief, or for recovery, reimbursement, contribution, or equitable share of response costs, with respect to OHM or waste material (regardless of the manner in which such OHM or waste material may be listed, defined, or characterized under the statutes or common law theories listed in subparagraph 22.1(a)) at any Off-Site Property, or portion of such property, at which: (i) GE is performing or in the future is performing response actions pursuant to this Order or the July 2, 1990 Consent Order; or (ii) GE has performed response actions pursuant to this Order or to the July 2, 1990 Consent Order but has not yet received a determination by the Department regarding an RAO Statement; or (iii) the Department has approved or in the future approves a Class A or Class B RAO Statement pursuant to this Order or the July 2, 1990 Consent Order in accordance with the MCP; provided, however, that this covenant shall not become effective, as to any particular Off-Site Property, until the time prescribed in Paragraph 22.4.
 - (a) The statutes and common law theories subject to the covenant in this Paragraph 22.1, and to the limitations set forth therein, are the following: Sections 107, 113, and 310 of CERCLA; Sections 1002, 1005, 1006, 1008, and 1009 of the Oil Pollution Act; Section 7002 of RCRA; Section 20 of TSCA; Section 505 of the

Clean Water Act; Sections 3A, 4, 4A, 5, 9, and 10 of M.G.L. c. 21E and Section 11 of M.G.L. c.21E for violation or enforcement of such Sections 3A, 4, 4A, 5, 9, and 10; Section 4 of M.G.L. c. 21H; Sections 5, 7, and 11D of M.G.L. c. 12; Sections 42, 44, 46, and 53 of M.G.L. c.21; Sections 9 and 10 of M.G.L. c. 21C; Sections 142A, 142B, 160, 160B, and 162 of M.G.L. c. 111; Section 169 of M.G.L. c. 111 for violation of Section 167; Sections 40, 40A, 42, and 90 of M.G.L. c. 131; Section 7A of M.G.L. c. 214; Section 39G of M.G.L. c. 40; Sections 59 and 59A of M.G.L. c. 91; and Sections 4, 9, and 11 of M.G.L. c. 93A for violation of Section 2 (including the implementing regulations of the statutes listed in this subparagraph); and *nuisance, trespass, negligence, strict liability, or restitution.*

22.2. Except as provided in Paragraph 22.6, and subject to Paragraphs 22.3, 22.4, and 22.5 below, the Commonwealth of Massachusetts covenants not to sue or take administrative action against GE for civil or administrative penalties or civil fines with respect to OHM or waste material (regardless of the manner in which such OHM or waste material may be listed, defined, or characterized under the statutes and regulations listed in subparagraph 22.2(a)) at any Off-Site Property or portion thereof described in Paragraph 22.1(i)-(iii) for alleged violations of or noncompliance with the requirements listed in subparagraph 22.2(a) based on information known to the Commonwealth as of the date of lodging of the 1999 Consent Decree or on Attorney General Investigative Information.

(a) The requirements subject to this Paragraph 22.2 are:

- (i) The 1990 Consent Orders;
- (ii) The corrective action permit issued by EPA to GE under the federal Resource Conservation and Recovery Act, effective January 3, 1994; and
- (iii) M.G.L. c. 21E; the MCP; M.G.L. c. 21H; Sections 26-53 of M.G.L. c. 21; M.G.L. c. 21C; Section 39G of M.G.L. c. 40; Sections 150A, 150B, 160, 162, and 170 of M.G.L. c. 111; Sections 40, 40A, 42, and 90 of M.G.L. c.131; M.G.L. c. 91; and M.G.L. c. 93A (including the implementing regulations of the statutes listed above and including, but not limited to, alleged violations or noncompliance with respect to any report, response, or submission by GE, or failure to make a report, response, or submission).

(b) For purposes of this Paragraph 22.2, “information known to the Commonwealth as of the date of lodging of the 1999 Consent Decree” shall mean the following:

- (i) All information listed and described in Paragraph 166.b(iv)(A) of the 1999 Consent Decree insofar as such information relates to Off-Site Properties;

- (ii) All work plans, reports, correspondence, and other documents submitted by GE to the Department regarding Off-Site Properties 30 or more days prior to the lodging of the 1999 Consent Decree;
 - (iii) The results of any sampling or other investigations conducted by the Department at or relating to Off-Site Properties and received by the Department 30 or more days prior to the lodging of the 1999 Consent Decree;
 - (iv) Information submitted by EPA to the Department presenting the results of sampling or other investigations conducted by EPA at or relating to Off-Site Properties, to the extent received by the Department 30 or more days prior to the lodging of the 1999 Consent Decree; and
 - (v) Any other information received by the Department regarding Off-Site Properties 30 or more days prior to the lodging of the 1999 Consent Decree, not including Attorney General Investigative Information.
- (c) For the purposes of this Paragraph 22.2, Attorney General Investigative Information shall mean any information obtained by agents of the Criminal Bureau of the Attorney General's Office (including members of the Massachusetts Environmental Strike Force) during the Attorney General's investigation into the violations alleged in the civil Complaint filed in Suffolk Superior Court in Commonwealth of Massachusetts v. General Electric Company on _____, 1999, including but not limited to, witness interviews, testimony before the Berkshire County Grand Jury, and documents marked as exhibits before or documents obtained by subpoena issued in the name of said Grand Jury; provided, however, that Attorney General Investigative Information shall not include any such information to the extent that it is or was independently obtained by the Department.
- 22.3. For each Off-Site Property, the covenants in Paragraphs 22.1 and 22.2 are conditioned on the satisfactory performance at such property of the response actions in compliance with this Order, and of the response actions required to be performed under the July 2, 1990 Consent Order following the date of lodging of the 1999 Consent Decree.
- 22.4. The covenants in Paragraphs 22.1 and 22.2 shall take effect for each Off-Site Property upon the Department's approval of a Remedial Action Work Plan (for properties subject to Article VII of this Order) or a Remedy Implementation Plan (for properties subject to Article VIII of this Order), or for those Off-Site Properties for which such a Remedial Action Work Plan or Remedy Implementation Plan was approved by the Department pursuant to the July 2, 1990 Consent Order prior to the effective date of this Order, upon the Department's receipt of the payment identified in Paragraph 20.2 or the effective date of this Order, whichever is later. If, based upon the results of a Department-approved Supplemental Investigation Summary Report (or further Supplemental Investigation Summary Report, if required) for properties subject to Article VII of this Order, or a

Department-approved Phase II Report for properties subject to Article VIII of this Order, no further response actions may be necessary to achieve a Class B RAO, then this covenant shall take effect for each such property upon the Department's approval of a Class B RAO Statement, or for those Off-Site Properties for which a Class B RAO Statement was approved by the Department pursuant to the July 2, 1990 Consent Order prior to the effective date of this Order, upon the Department's receipt of the payment identified in Paragraph 20.2 or the effective date of this Order, whichever is later. In any event, no covenant under Paragraph 22.1 or 22.2 shall take effect until the Department receives the payment identified in Paragraph 20.2.

- 22.5. For any Off-Site Property for which the Department has approved an RAO Statement, the covenants in Paragraphs 22.1 and 22.2 shall apply to the extent (in terms of geographic coverage and constituents covered) to which the Department has approved such RAO Statement and supporting documentation, and shall not apply to constituents or portions of the property (if any) that were not the subject of the evaluations or other response actions addressed by the RAO Statement and approved by the Department. Until Department approval of the RAO Statement, the covenants in Paragraph 22.1 and 22.2 shall apply to the extent (in terms of geographic coverage and constituents covered) to which the Department has approved the Remedial Action Work Plan or Remedy Implementation Plan, as applicable.
- 22.6. The covenants in Paragraphs 22.1 and 22.2 shall not apply to any matters other than those expressly specified in those Paragraphs. The Department reserves, and this Order is without prejudice to, any and all administrative or judicial claims against GE with respect to *any* and all other matters whatsoever, including but not limited to:
- (a) Claims based on a failure to meet any requirement of this Order;
 - (b) Claims regarding properties or portions of properties not subject to this Order or the July 2, 1990 Consent Order;
 - (c) Criminal liability;
 - (d) Claims for failure to notify the Department of releases or threats of releases of OHM;
 - (e) Claims for failure to adequately and completely respond to, or comply with, requests for information issued by the Department, including, but not limited to:
 - (i) failure to produce complete and timely information and records to the Department with regard to the transportation, transfer, or disposal of Fill, debris, or other material from the GE Facility; or
 - (ii) making, or causing any person to make, false, inaccurate, incomplete, or misleading statements with regard to the transportation, transfer, or disposal of Fill, debris, or other material from the GE Facility;

- (f) Claims based on GE's liability for violations of federal or state law which occur after the lodging of the 1999 Consent Decree (including, but not limited to, violations by GE of a recorded AUL at an Off-Site Property), subject to Paragraph 16.3;
- (g) Claims for natural resource damages arising from Off-Site Properties under Section 107 of CERCLA, Section 5 of M.G.L. c. 21E, or other federal or state laws authorizing such claims;
- (h) Claims for damage to a property interest owned by the Commonwealth at an Off-Site Property; provided, however, that nothing in this subparagraph 22.6(h) shall be read as reserving a claim for which the Commonwealth has given a covenant pursuant to Paragraphs 22.1 and/or 22.2;
- (i) In the event that GE brings any action against the Commonwealth relating to any Off-Site Property, or portion thereof, that is not subject to the covenants in Paragraph 22.7, all claims, counterclaims, defenses, or causes of action against GE that arise out of such action by GE; provided, however, that nothing in this subparagraph shall limit the right of GE to assert any defense to such claim or cause of action; and
- (j) Claims regarding those Off-Site Properties, if any, subject to Paragraph 7.1(a) of this Order.

Nothing in this Paragraph 22.6 shall be deemed to affect the covenants granted by the Commonwealth to GE in the 1999 Consent Decree or in the Settlement Agreement and Consent Judgment in Commonwealth of Massachusetts v. General Electric Company [add citation].

22.7 Subject to the provisions of Paragraphs 22.8, 22.9, and 22.10, GE hereby covenants not to sue and agrees not to assert any claims or causes of action against the Commonwealth of Massachusetts with respect to OHM or waste material at any Off-Site Property, or portion thereof, described in Paragraph 22.1(i)-(iii). The claims or causes of action covered by this Paragraph 22.7 include, but are not limited to:

- (a) Any direct or indirect claim for reimbursement, recovery, contribution or equitable share of response costs pursuant to M.G.L. c. 21E;
- (b) Any claims under Section 107 or 113 of CERCLA, Section 7002 of RCRA, Section 504 of the Clean Water Act, or Sections 1002, 1005, 1008, 1009, or 1015 of the Oil Pollution Act, or based on nuisance, trespass, negligence, strict liability, or restitution;
- (c) Any claims arising out of response actions at such Off-Site Properties, including claims based on the Department's selection or performance of response actions, oversight of response actions, or approval of plans for such response actions; and

- (d) Any claim under the United States Constitution or the Massachusetts Constitution for “takings.”

22.8. Nothing in Paragraph 22.7 shall be construed to preclude GE from pursuing dispute resolution under Article XV of this Order, or from submitting comments to any agency of the Commonwealth or challenging rules, regulations, or permits issued by any such agency.

22.9. Nothing contained in Paragraphs 15.1 or 22.7 or elsewhere in this Order (except as otherwise provided in Paragraph 24.1) shall be construed as a waiver by GE of any rights which GE may have to pursue any remedies which GE may be entitled to under applicable law to challenge any determination by the Department under this Order, including, but not limited to, any right that GE may have under applicable law to seek judicial review or relief. Similarly, nothing in this Paragraph 22.9 shall be construed as a recognition by the Department that GE has any such rights, or as a waiver by the Department of its right to take a contrary position.

22.10. GE reserves, and this Order is without prejudice, to the following:

- (a) Any right by GE to submit and pursue claims regarding requests for information on any subject under M.G.L. c. 66 (Public Records Act);
- (b) Any and all rights by GE to defend against a request for information or administrative subpoena submitted by, and/or an action related to such request for information or subpoena brought by, the Commonwealth under State law, including but not limited to Section 8 of M.G.L. c. 21E;
- (c) In the event that the Commonwealth brings an action against GE for natural resource damages at or relating to any Off-Site Property, or for damage to such a property owned by the Commonwealth, or any other action against GE relating to any Off-Site Property, or portion thereof, that is not subject to the covenants in Paragraphs 22.1 and/or 22.2, all claims, counterclaims, defenses, or causes of action against the Commonwealth that arise out of such action by the Commonwealth; provided, however, that nothing in this subparagraph shall limit the right of the Commonwealth to assert any defense to such claim or cause of action; and
- (d) Any claims or defenses relating to the administration or enforcement of a recorded AUL at any Off-Site Property that GE may otherwise have under state law, in its capacity as the grantor of such AUL or as owner of such property, against an agency of the Commonwealth in its capacity as grantee of such AUL.

Nothing in this Paragraph 22.10 shall be deemed to affect the covenants granted by GE to the Commonwealth in the 1999 Consent Decree.

- 22.1. In any subsequent administrative or judicial proceeding initiated by the Commonwealth against GE, or by GE against the Commonwealth, for injunctive relief, recovery of response costs, or other appropriate relief relating to Off-Site Properties or to other properties where waste materials from the GE facility have come to be located, neither GE nor the Commonwealth shall assert or maintain any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the Commonwealth or GE were or should have been raised and resolved in this Order; provided, however, that nothing in this Paragraph 22.11 affects the enforceability of the covenants not to sue (both by the Commonwealth and by GE) set forth in this Article XXII.

Article XXIII - Waiver

- 23.1 Failure on the part of the Department to complain of any action or non-action on the part of GE shall not constitute a waiver by the Department of any rights hereunder.
- 23.2. No waiver by the Department of any of the provisions herein shall be construed as a waiver of any of the other provisions herein.
- 23.3. A waiver at any time of any of the provisions herein shall not be construed as a waiver at any subsequent time of the same provisions.
- 23.4. The consent or approval by the Department of any action by GE shall not constitute consent or approval by the Department of any subsequent similar action.

Article XXIV-Waiver of Adjudicatory Hearing

- 24.1. GE hereby consents to the issuance of this Order and therefore waives any right to an administrative hearing, a tentative decision, judicial review, reheating, reargument, and reconsideration of this Order, and to notice of any such rights of review, with respect to the terms and issuance of this Order.

Article XXV - Limitation

- 25.1. This Order shall not constitute or be construed as an admission, an estoppel, or a waiver of defense by GE, or as an adjudication or finding on any issue of fact or law in any proceeding other than in an action by the Commonwealth of Massachusetts or the Department arising from the violation of any term or condition of this Order.
- 25.2 Nothing in this Order shall modify or in any way affect GE's obligation to notify the Department of releases or threats of releases of OHM as required by M.G.L. Chapter 21E and the MCP.

- 25.3 This Order shall not limit or be construed as limiting in any way the applicability of any law (including M.G.L. c.21E or the MCP) to any property, or portion thereof, or to any chemical constituents, that are not regulated by this Order, or to properties, if any, subject to Paragraph 7.1(a) of this Order. This limitation is not intended to restore any claims covered by the Commonwealth's covenants in Article XXII herein.

Article XXVI - Multiple Copies

- 26.1. This Order shall be executed in two counterparts, each of which shall be deemed an original, but each of which shall constitute one and the same document.

Article XXVII - Severability

- 27.1 If any of the terms or provisions of this Consent Order or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Consent Order, or the application thereof, shall not be affected thereby, and each remaining term and provision shall be valid and enforceable to the fullest extent permitted by law.

Article XXVIII - Termination

- 28.1. The obligations of GE under this Order shall terminate upon the earlier of the following: (a) written agreement between the Department and GE that all response actions required by or pursuant to this Order have been completed, or (b) 15 years from the effective date of this Order; provided, however, that any such termination shall not apply to any property for which GE had previously obtained credible evidence of Fill from the GE Facility and therefore had begun the process set forth in Article VII or VIII of this Consent Order, as to which properties termination of GE's obligations under this Order shall take effect upon the Department's approval of the RAO Statement.
- 2x.2. Following termination of GE's obligations under this Order, the rights and obligations of the parties shall be governed by all applicable laws and regulations, including the MCP to the extent applicable; provided, however, that the covenants in Article XXII of this Order shall survive such termination in accordance with the terms of Article XXII.

Article XXIX - Effective Date

- 29.1. This Order will be effective upon the date of the signature of a duly authorized representative of the Department as set forth below.

Article XXX - Ratification

Consented To By:

General Electric Company
100 Woodlawn Avenue
Pittsfield, MA 01201

I certify that I am duly authorized to enter into this Consent Order on behalf of:

General Electric Company:

By: _____ Date: _____
Signature

Print Name

Federal Employer Id. Number

Its: _____
Title

Ordered By:

The Department of Environmental Protection

Hereunto duly authorized

By: _____ Date: _____
Signature

Print Name

Title

Approved as to Article XXII (Covenants Not To Sue and Reservations of Rights) by:

Office of Attorney General, Commonwealth of Massachusetts

Hereunto duly authorized

By: _____ Date: _____
Signature

Print Name

Title
